UN

United Nations / International Maritime Organization

Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages

Distr.
GENERAL

A/CONF.162/3
11 November 1992

ENGLISH
Original: ARABIC/ENGLISH
FRENCH/SPANISH

Geneva, 19 April 1993
Item 8 of the provisional agenda

PREPARATION AND ADOPTION OF A CONVENTION ON MARITIME LIENS AND MORTGAGES

Compilation of comments and proposals by Governments, and by intergovernmental and non-governmental organizations on the draft convention on maritime liens and mortgages

CONTENTS

	Paragraphs
INTRODUCTION	1
COMPILATION OF COMMENTS AND PROPOSALS	2 - 83
Governments	
FRANCE	2 - 14
GERMANY	15 - 17
IRAN (Islamic Republic of)	18 - 21
JAPAN	22 - 23
OMAN	24
SINGAPORE	25 - 27
SPAIN	28 - 34
SWITZERLAND	35 - 45
THAILAND	46 - 50

GE.92-52888 (E)

CONTENTS (continued)

	Paragraphs
Intergovernmental organizations	
FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)	51 - 53
Non-governmental international organizations	
INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS . . .	54 - 62
INTERNATIONAL SHIP SUPPLIERS ASSOCIATION	63 - 83

INTRODUCTION

1. This document sets out the comments and proposals of Governments and intergovernmental and non-governmental organizations on the Draft Convention on Maritime Liens and Mortgages that were received as of Monday, 19 October 1992. Up to that date comments had been received from the following:

Governments: France, Germany, Iran (Islamic Republic of), Japan, Oman, Singapore, Spain, Switzerland, Thailand;

Intergovernmental organizations: Food and Agriculture Organization of the United Nations (FAO);

Non-governmental organizations: International Confederation of Free Trade Unions, International Ship Suppliers Association.

COMPILATION OF COMMENTS AND PROPOSALS

States

FRANCE

[Original: FRENCH]

2. The Office of the Secretary of State for Maritime Affairs believes there is a need to review the Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, of 10 April 1926, whose provisions are incorporated in Act No. 67-3 of 3 January 1967 on the status of vessels and other seagoing ships, and it is therefore in favour of the adoption of the new draft convention.

3. An examination of the text of the draft articles has to be undertaken with a view to formulating any observations that might form the subject of reservations at the diplomatic conference.

Observations which might form the subject of reservations at the diplomatic conference:

4. Comments on the substance of the draft articles. Comments are called for only regarding the following articles, but especially on article 6 bis, dealing with rights of retention, in respect of which a reservation might be entered and which, it is felt, should be eliminated.

Article 6 bis: rights of retention

5. The French delegation has always strongly favoured exclusion of the right of retention from any convention dealing with liens and mortgages. Rights of retention are substantively different and cannot be outranked by the claim of any holder of a lien. Neither the holder of a lien or a mortgage can prevent the exercise of a right of retention.

6. Consequently, the new instrument, like the 1926 Convention, must not aim to prevent the exercise of a right of retention and should not deal with this right. A country will thus be able to avail itself of a right of retention if such a right is recognized by its legislation.

7. Article 6 bis calls for a reservation to the effect that it falls outside the scope of the Convention. This article is liable to render the mortgage system fragile and may prevent achievement of a broad consensus.

Article 15: temporary change of flag

8. The present wording of the draft article is satisfactory but the idea that the provisions of article 15 are provisions of public law must be opposed.

9. The new convention should not lead to the establishment of an international regime providing for changes of flag: the article is concerned only with the mortgage system, where there is a temporary change of flag.

10. Comments on the form of the draft articles. In articles 6 and 7, in order to distinguish national or second-rank liens from the international maritime liens established by the Convention, many States have sought to avoid using the term maritime lien in referring to them, and have preferred to use instead the term lien.

Article 6: other liens

11. The words within the square brackets "maritime liens or" could be deleted and only the words "other liens" retained.

Article 7: characteristics of maritime liens

12. For greater clarity the words within the square brackets should be deleted, since the reference is only to the first priority liens enumerated in article 4.

Article 10: notice of forced sale

13. The contents of paragraph 4, which provides for the possibility of waiving notice, should be deleted. Having regard to the problems of proof which this question raises, it is preferable to provide for an additional notice.

14. The bracketed subparagraph (b) of paragraph 2 also seems unnecessary. The draft articles do not call for any other comment.

GERMANY

[Original: ENGLISH]

15. The Government of the Federal Republic of Germany welcomes the draft convention on maritime liens and mortgages elaborated by the Joint Intergovernmental Group of Experts. It considers that draft to be an important step along the path towards international harmonization of the law on maritime liens and mortgages.

16. The German Federal Government supports the draft convention's objective of restricting the catalogue of maritime liens and engendering a clarification of the legal situation associated with a temporary change of flag.

17. The draft still contains a number of unresolved questions of detail. These will require discussion at the Diplomatic Conference. The Government of the Federal Republic of Germany reserves the right to make proposals on those questions at the appropriate time.

IRAN (ISLAMIC REPUBLIC OF)

[Original: ENGLISH]

Article 4

18. Considering that paragraph 2 of article 11 of the draft convention provides that the costs of repatriation of the crew be considered as costs to be paid immediately after the forced sale and before the distribution of the proceeds of the sale between the holders of maritime liens, therefore the insertion of the cost of repatriation in paragraph 1 of article 4 as a maritime lien seems to be redundant. With regard to the above explanation, if there is no difference between "repatriation" inserted in paragraph 2 of article 11 and the wording "costs of repatriation" as provided in paragraph (a) of article 4, we propose that the wording "costs of repatriation" be deleted from paragraph (a) of article 4.

19. In our view, the wording "physical loss or damage" provided in paragraph (e) of article 4 seems to be rather ambiguous. Taking into consideration that in the 1967 Convention the wording reads " ... in respect of loss of or damage to property", and considering also that the present draft contains an independent paragraph, namely paragraph (b), which covers any claim arising out of loss of life or personal injury, it seems therefore that the applicability of "physical loss or damage" set out in paragraph (e) of article 4 covers mainly the property, not the loss or damage suffered by persons. In order to remove this ambiguity, we would like to propose that the matter be further discussed and clarified as to whether the wording applies to property only or to other things (including human).

Article 6 bis

20. Considering the last line of paragraph (1) of article 5, which reads: " ... except as provided in article 6 bis" it seems that the content of article 6 bis (right of retention) covers the claims which take priority over

maritime liens set out in article 4 and registered mortgages, "hypothèques" and charges. It seems also that paragraph 2 of article 6 bis indicates how this priority should be applied to maritime liens and mortgages as provided in article 4.

21. With regard to the previous discussions and different interpretations in different national legal systems regarding the above subject, we believe that the first sentence of paragraph 2 of article 6 bis seems not to be clearly expressed. Regarding the first sentence of paragraph 2 (6 bis), apparently the purport of the right of retention which cannot prejudice the enforcement of maritime liens is that the holder of the right of retention cannot prevent the forced sale with the excuse of retention until his claim is settled. However, in respect to the registered mortgages such rights are reserved for him. Since paragraph 2 of article 6 bis could be interpreted in different forms, we believe it is necessary that the intended interpretation of the above wording be clarified in the draft.

JAPAN

[Original: ENGLISH]

22. National laws on the effects of maritime liens, mortgages and other charges, as well as the enforcement procedures thereof, are closely linked with the public interests of each State and are in particular of a territorial nature. Therefore, international provisions on these matters should be as flexible as possible bearing in mind the existing diversity of legal systems of States.

23. Neither the Japanese authorities in charge of these matters nor the Japanese maritime industry have observed any particular problem in the current legal system governing these matters.

OMAN

[Original: ARABIC]

24. The Permanent Mission of Oman has the honour to inform the secretariat of UNCTAD (Shipping Division) that it has observed that the Arabic version of article 10 of the draft, concerning notice of forced sale, differs from the original English text by omitting the adjective "musajjala" (registered) after the word "a'ba" (charges) in paragraph (c). We are making this observation because, under the general rules, a mortgage that has been duly concluded affects the contracting parties but not third parties and the holder of a mortgage has the right to apply and follow up his application only if his name has been entered in the register.

SINGAPORE

[Original: ENGLISH]

Article 3 (1): Voluntary change of ownership or registration

25. Paragraph 1 of article 3 is not clear as to whether the Registrar of Ships can require one option rather than the other or must he be bound to accept either a discharge or a written consent; whichever is submitted to him? We suggest that this provision be clarified.

Article 3 (2)

26. Paragraph 2 of article 3 may hinder the flow of commerce if the owner wishes to buy and transfer a ship at short notice. Moreover, the former State for some reason or other may be slow in issuing the certificate of deregistration. We understand that it is the practice of several Registries to allow provisional registration subject to the subsequent production of the deregistration certificate. We suggest the insertion of the following paragraph:

> "Article 3 (3)
>
> (3) Notwithstanding paragraph 2, a State Party may register a vessel provisionally subject to the condition that the certificate referred to in paragraph 2 be issued within such time as the State Party may specify."

Article 11 (3)

27. We do not agree that a requirement be imposed on the Registrar of Ships to delete all registered mortgages, "hypothèques" or charges except those assumed by the purchaser. It should be sufficient that the certificate issued by the competent authority certifies that the vessel is sold free of encumbrances.

SPAIN

[Original: SPANISH]

28. Draft article 12, paragraph 1, provides that "Unless otherwise provided in this Convention, its provisions shall apply to all seagoing vessels registered in a State Party or in a State which is not a State party". Having regard to this provision and the general interest in avoiding dual registration, the question arises whether it would not be desirable to alter article 3, paragraph 2, so that it would not refer exclusively to the case of vessels which are registered in one State Party and for which registration in another State Party is sought. With the present wording, the article would allow, at least in theory, a vessel registered in a State which is not a Party to be entered in the registry of a State Party.

29. In article 4, paragraph 1 (a), it would be desirable to refer expressly to claims for severance pay, in order to avoid discussion as to whether or not such costs are included among the privileged claims.

30. Article 6 bis of the draft articles should be retained, as should the new paragraph 3 of article 11 as proposed by the Chairman of the Group of Experts.

31. In article 10, paragraph 2, subparagraph (b) should be retained and the paragraph should no longer provide for alternatives. The purpose of this amendment would be to avoid as far as possible the so-called "forum shopping" by providing suitable information for third parties concerned.

32. The most substantial and difficult amendment to the draft articles that we have to propose concerns article 11, paragraph 3. As it is worded at present, this provision makes automatically enforceable the decision of a court of a State Party concerning the forced sale of a vessel registered in another State party, without any need for enforcement proceedings. While it is obvious that merchant traffic would be expedited by means of such a provision, it would also facilitate the commission of acts in circumvention of the law such as the above-mentioned "forum shopping" (e.g. the not necessarily rare cases in which the owner of the vessel and the holder of one of the mortgages reach an agreement for the forced sale of the vessel to take place in a country other than that in which it should in principle be held, with the aim of rendering more difficult the application of certain rules of the latter country, such as those concerning determination of amounts due to the crew of the vessel).

33. In our opinion, consideration should be given to the need for enforcement proceedings to ensure that the registering authority of the State of registry is obliged to delete all registered mortgages, "hypothèques" or charges.

34. In the Spanish version of article B, paragraph 2, of the Draft Final Clauses, the words "ese consentimiento tendrá vigor ..." should be replaced by "ese consentimiento producirá efectos ...".

SWITZERLAND

[Original: FRENCH]

35. Although it has no coastline, Switzerland maintains under its flag a merchant fleet of over 600,000 dead weight tons and, as a financial centre, it is also interested in the international legal safeguards granted to the holders of maritime mortgages. It therefore endorses the principal aim of adoption of a new convention, namely to favour maritime credit either through international recognition of maritime mortgages or by reducing the number of maritime liens having priority over registered mortgages.

36. Switzerland has ratified the 1926 Convention and has incorporated its rules into Swiss law. The Convention has proved largely satisfactory. The move towards a new convention is justified only if the new instrument brings genuine improvements in the protection of mortgage claims. It is from this standpoint that the comments of Switzerland are submitted for consideration by the Diplomatic Conference to be held from 19 April to 7 May 1993.

37. The list in draft article 4 of the privileged claims taking priority over mortgages is still very extensive and very large sums may be involved under paragraph 1, subparagraphs (b) and (e). The restriction in paragraph 2 for claims arising out of oil pollution damage for which compensation is payable pursuant to the 1969 Convention (CLC), is by no means satisfactory. Claims arising from pollution damage must be excluded as a whole, and without distinction according to whether they are governed by the above-mentioned Convention (which is not the case in regard to States which have not ratified it) or by national legislation, and without any distinction according to whether the pollution is caused by oil or by other dangerous goods. Bearing in mind, for example, the new United States Oil Pollution Act, 1990, the magnitude of such unlimited claims is unforeseeable and uninsurable. If claims arising from oil pollution damage are secured by an unrestricted maritime lien, the mortgage claim will be seriously affected and it will not be possible to achieve one of the main purposes of the new convention.

38. For these reasons Switzerland will support greater restriction of maritime liens taking priority over mortgages.

39. The problem of the rights of retention of the shipbuilder and the ship repairer have not been dealt with satisfactorily in the draft convention. There are some States which have a mandatory right of retention while there are others which regard this right as a right in rem during the execution phase. If the shipbuilder or ship repairer has only a lien of lower priority than the maritime liens provided for in article 4, his right becomes illusory, especially if the vessel is a total loss and no shipyard is prepared to repair it. The existence, and particularly the amount, of any priority maritime liens are not always known when the vessel is delivered to the shipyard. Determining with accuracy the claims which will rank before those of the shipyard often involves lengthy procedures. We fear that international unification of the right of retention may not be possible, but the convention might at least indicate what law should apply to the right of retention, having regard to the fact that the building and repair of a vessel always take place within the jurisdiction of a given State and without any international implications. It would thus be possible simply to state that the right of retention or lien of the shipbuilder or ship repairer are governed by the law of the State where the building or repair of the vessel took place and that this State's law governs the conditions and effects of this right and is not restricted by the rules of the convention. It should be accepted that the repairer of a vessel, by providing materials and labour, creates added value for the vessel and thus for the security of the creditors, who should have a share in it only if the repairer is fully compensated. Draft article 6 bis does not take this economic fact into account.

40. The foregoing comment concerning the basis and the prescription period of the maritime liens referred to in the Convention should also apply to the other (so-called "national") liens referred to in draft article 6. Although these national liens, which should only be maritime liens and not other liens under normal law, rank below mortgages, the disadvantage will continue to exist for any shipowner and his creditors that they will not know what liens may attach to a vessel sailing in the waters of different States which may

allow a multiplicity of possible liens. The rules of private international law vary from State to State and with the practice of the courts concerned. Some States regard a maritime lien as a procedural rule, whereas others regard it as a substantive right and, depending on their approach, they apply a particular type of law. Even if a national lien is ranked after the mortgages, it may give rise to the vessel's arrest in any jurisdiction and oblige the shipowner or his mortgagee to intervene to ensure that the value of the vessel is not affected according to the place of arrest, particularly if there is no market for the vessel locally. It would therefore be in the interest of every shipowner and of the mortgagees to be able to foresee as accurately as possible the risk of any liens existing, including even national liens. One possibility would be to restrict recognition of national liens in another State, for example by means of a rule to be included in a second paragraph of article 6:

> "Such liens shall be recognized in another State Party in which seizure of the vessel, leading to its forced sale, is ordered only if they are also provided for in the legislation of the State of registry of the vessel."

41. Draft article 4 contains a list of the maritime liens "on vessels" whose inherent characteristics are specified in article 7 only as regards the right to trace or, in other words, the characteristic of right in rem. However, nothing is said regarding the basis of maritime liens, whether those referred to in draft article 4 or those allowed by the national law (article 6), and nothing is said about the applicable law.

42. Some legislations provide for statutory subrogation in rem of the claimant in four cases:

(a) In the case of material damage to the vessel (for example in a collision) the compensation payable to the owner is subrogated to the vessel;

(b) In the case of general average, the sums payable to the owner are subrogated to the vessel;

(c) In the case of salvage by the mortgaged vessel the latter may suffer damage. Here the compensation which its owner receives will take account of the resultant damage and the compensation will then be subrogated to the loss or damage to the mortgaged salvaging vessel;

(d) In the case of insurance, the compensation paid by the insurer in respect of the hull will be subrogated to the vessel. Fortunately, however, this fourth subrogation was explicitly excluded by article 4 of the 1926 Convention and counts only in favour of the mortgagees, because hull insurance compensation is the mortgagee's only security in case of loss of the vessel.

43. The present draft articles are silent on these matters. This is a serious omission because, in the absence of international rules, each national legislation will be able to determine the basis of mortgages and liens, including in the cases of statutory subrogation. It is therefore absolutely essential that the new convention specify the base at least of maritime liens

(both international and national), as well as the cases of statutory subrogation in rem, along the lines of the 1926 Convention, for example by adding a second paragraph to article 7 reading:

"Claimants holding liens may not be subrogated in the compensation payable to the owner of the vessel under an insurance contract".

44. With regard to the extinction of maritime liens by lapse of time as provided for in draft article 8, it will be necessary to consider whether, apart from arrest, only seizure (in this case of the legal security offered by the lien) leading to a forced sale is sufficient to maintain the validity of the lien. If a lien holder asserts his claim before the courts, either through the procedure of realizing the security which the lien confers upon him, by applying for the opening of bankruptcy proceedings or by a request in bankruptcy proceedings for ranking as the holder of a lien, his claim should not be extinguished if, during the proceedings, the owner-debtor settles the amount payable and the forced sale becomes unnecessary. Nor is it always the lien holder who requests the seizure; it may be any other claimant. Where this is the case, the lien holder should not himself be obliged, in order to observe the prescribed period, also to request the arrest of the vessel and to proceed as far as a forced sale. The words "such arrest or seizure leading to a forced sale" should therefore be deleted or replaced by the following:

"... if the holder of the lien has not taken legal action in support of his claim".

45. The provisions of draft article 11 on the effects of forced sale give rise to serious concern:

(a) It is not sufficient for the State to "ensure" that any proceeds of a forced sale are actually available and freely transferable for the mortgages to be said to cease to attach to the vessel. This should be made a specific requirement and included as a subparagraph (c) in paragraph 1 of article 11. The argument that such a requirement would no longer allow a mortgagee to become the purchaser of the vessel by setting his claim against the purchase price is not valid. This amounts to availability and transferability. In order to avoid any possible doubt, the text should be made clearer. In any event, the requirement of transferability and availability of the sale proceeds should benefit the mortgagees in declaring the extinction of their right.

(b) The certification referred to in article 11, paragraph 3, should take account of the above-mentioned requirement.

The requirement that the registrar delete all registered mortgages from the register merely upon production of certification by the competent authority of the State where the forced sale takes place, without any enforcement proceedings, goes too far and is not consistent with international practice with regard to recognition of judicial acts of one State in another sovereign State. The forced sale of a vessel does not take place only upon application by a mortgagee or the holder of a lien for the purpose of enforcement of a claim in civil law. It is also carried out in order to satisfy claims in public law (fines, customs dues, etc.). The conventions on recognition and

enforcement of foreign judgements and arbitral awards contain safeguard clauses and, in particular, a reservation in respect of public policy. The draft convention contains no such safeguards. It should be noted that under the law of several countries a mortgage is valid, even between the parties, only if it is entered in the register, and it loses its effect upon its deletion from the register. For these reasons, the second sentence in paragraph 3 of article 11 is unacceptable. The convention should at least contain a clause enabling each State to declare that it does not accept this rule or that it will apply it only if it conforms to its public policy requirements.

THAILAND

[Original: ENGLISH]

46. In general the text of the draft convention on maritime liens and mortgages prepared by the Joint Intergovernmental Group of Experts is acceptable, except article 4, article 6 bis, and article 8, which should be amended as follows:

Article 4: Maritime liens

47. Subparagraph (d) of paragraph 1, which reads "(d) claims for port, canal, and other waterway dues and pilotage dues;" should be deleted entirely. Claims ranking before registered mortgages, "hypothèques" or charges should be as limited as possible in order to safeguard the loan money of the mortgagee extended to the shipowner. It is understood that this draft convention is aiming at unification of private maritime law as well as to encourage sources of capital for ship financing in developed countries to extend more loans to shipowners in developing countries. For the latter purpose of the draft convention, claims which rank before registered mortgages should be limited to only those arising out of damages done by and "extremely necessary" services rendered to the ship.

Article 6 bis: Rights of retention

48. Granting a right of retention to shipbuilder and ship repairer is not uncommon in the national law of many countries including Thailand. Such right of retention is acceptable in so far as it does not prejudice the rights of the mortgagee. So, neither claims for shipbuilding nor claims for repair should rank before registered mortgages, "hypothèques", or charges. Whether shipbuilder or ship repairer, having exercised his rights of retention or not, his claims should never rank before registered mortgages, "hypothèques" or charges. Since a shipbuilding contract is not a maritime contract, therefore claims for shipbuilding are not "maritime claims". That is why such claims should not be in a position equivalent to maritime liens, i.e., to rank before registered mortgages, "hypothèques", or charges. Regarding a claim for repair which is "a maritime claim" but an unregistered one, it is acceptable to treat it as "other liens" under article 6 which shall rank after registered mortgages, "hypothèques" or charges.

Article 8: Extinction of maritime liens

49. There should be additional provisions to the effect that each State Party may provide in its national law to allow the purchaser of a vessel to get rid of maritime liens previously attached to the vessel by taking certain measures or steps specified in law. For example, a State Party may provide in its national law that:

(a) A purchaser of a vessel who wishes to free the vessel from existing maritime liens shall provide notice by publication to all holders of the maritime liens on the vessel to lodge their claims within a given period of time.

(b) Unless holders of maritime liens have lodged their claims within the given period of time under (a), all maritime liens attached to the vessel before transfer of ownership shall be extinguished.

50. These measures, if allowed, will be helpful to the purchaser of a secondhand vessel in ensuring that he will not become a "victim" of the "secret" nature of maritime liens.

Intergovernmental organizations

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

[Original: ENGLISH]

51. The Food and Agriculture Organization finds the proposals for a Convention on Maritime Liens and Mortgages to be both pertinent and timely.

52. With regard to the draft articles of a convention, it is the opinion of this organization that in the case of the forced sale of a ship, article 10, no pertinent information should be withheld from the persons entitled to notice.

53. Furthermore, with respect to article 15, the organization supports the view that the convention should not permit dual nationality.

Non-governmental international organizations

INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS

Article 1

54. There is no definition of "State Parties" anywhere in the draft convention. Since this is a defined term, the definition should be stated. Consequently "State Parties" should be defined.

Article 3

55. It is not clear from the language used in paragraph 1 whether it is designed to protect mortgages, etc, in the event of transfer of registration to a State not party to the convention.

Article 4

56. The opening of article 4 paragraph 1 should be amended as follows:

Add the words "or person in possession or control of the vessel";

Replace "be secured by" with "give rise to";

Since maritime liens can be enforced against the vessel in question or a sister ship, article 4 paragraph 1 as currently worded does not allow for the arrest of a sister ship. The paragraph should state for example that the claims give rise to a maritime lien on the vessel in question or any other vessel which is beneficially owned as respects all of the shares by the person who would be liable on the claim in an action in personam;

We would suggest that in article 4 paragraph 1 (a) line 3, the following words should be added after "including" "but without prejudice to the generality of the foregoing";

The word "direct" should be deleted from article 4 paragraph 1 (b) (second line);

We are not sure what article 4 paragraph 1 (e) seeks to refer to. If it is referring to a claim in tort for personal injury, then it surely should be linked to (b) of the same paragraph;

For the purpose of article 4 "members of the vessel's complement" should also include catering concessionaire crews.

Article 5

57. The wording of article 5 paragraph 2 should be clearer. What the paragraph appears to be saying is that salvage claims are to have priority over all other liens accruing before the salvage claim but not claims accruing after the salvage claim (including claims for wages or personal injury or loss of life which accrue after salvage). In any case, seafarers' claims should have priority at all times;

The opening words of article 5 paragraph 3 should be "The maritime liens within each of ...").

Article 8

58. The time scale in article 8 paragraph 1 for the maritime lien to be extinguished should be at the expiry of the limitation period of the claimant's right of action or at the very earliest after three years from the time the right of action accrues;

The wording in article 8 paragraph 1 (second line) " ... unless, prior ... forced sale" should be extinguished. Alternatively, the restriction should be that the claimant must have started his claim within the defined period.

Article 9

59. The words "secured by" in the first line should be replaced with "giving rise to" (see our comments on article 4 above).

Article 10

60. The notice requirements prior to the forced sale of a vessel should be less stringent.

Article 11

61. In line 3 of paragraph 2, insert the following words before vessel "and the crew".

The words "and of all liens and other encumbrances" should be deleted from line 5 of paragraph 3.

Article 15

62. We would suggest that in paragraph (d), second line, a full stop should be put after "another State" and the remainder of the paragraph should be deleted.

INTERNATIONAL SHIP SUPPLIERS ASSOCIATION

[Original: ENGLISH]

63. In the final report of the Joint Group of Experts, document JIGE(VI)8, page 2, states that "detailed consideration has been given to a number of proposals put forward by governmental and non-governmental delegations with the object of producing a draft that would receive wide acceptance by governments and the shipping community".

64. It is, however, noted with regret that in the three years of the Committee's work none of our submissions found acceptance, although they were strongly supported by delegations of many important maritime countries and despite the fact that our category is one of the most important in the shipping community.

65. We believe, in view of the importance the Committee of Experts of the Diplomatic Conference attached to the acceptance of their proposals by Governments and the shipping community, that they must now be subject to reconsideration. In particular, the consequences of cancelling the ship supplier's right to maritime lien must be properly assessed and his right to this warranty reinstated. The right of ship suppliers to maritime lien is embodied in the Convention of 1926, which is still in force today in many maritime States and the Convention of 1967 would probably also have maintained this right, if the ship suppliers' claims had been considered on their own merits, in the light of the special considerations in clause 5 of article 2, apart from other operative claims. These considerations arise not only from the way in which the services are performed, but also from the nature of the credit itself, which relates in a large part to the provision of victuals, and

other "necessaries" for the crew, and to supplies for the upkeep of the ship. The deletion of the right to maritime lien, along with other operative claims, is the main reason that the Convention of 1967 remains unratified by Governments, is unsatisfactory to the shipping industry and is in practical terms defunct.

66. A right of maritime lien for the supplier of victuals, and the materials required for ship upkeep, is not only in the interests of ship suppliers but also in the interests of all categories involved in ship operations, for whom a rapid turn-round in harbour is essential. The alternative to such a warranty, pre-payment, as suggested by some members of the Committee of Experts, would not only deprive shipowners of a significant credit line, if the total sum extended were considered in its globality, but could also lead to significant delays in sailing times where remittances were delayed for one reason or another.

67. In addition, the difficulties created by the loss of the right to maritime lien are compounded by the modern trend for ships to be managed by management companies with the vessels chartered or leased to them, making identification of the legal owner more and more difficult. The logical outcome can only be that suppliers will restrict credit to those shipowners known to make timely payments and this would adversely affect small, new and unknown shipping companies, particularly those belonging to developing countries to whom the Conference gives, apparently, such importance.

68. The arguments above, repeated many times in the long debates in the sessions between 1986 and 1989, are the basis of our contention that the right to maritime lien for the ship supplier is in the general interests of the maritime industry. The protection offered by maritime lien is in practice a psychological one, used more as a deterrent than in its actuality and needed to allow the ship supplier to grant immediate credit to ships, often of unknown ownership. Such a right does not affect the mortgagees, since although it has a higher order of ranking, it is invariably a very small proportion of the total amount claimed, particularly in relation to that claimed by the creditors' banks.

69. In addition to the political arguments in support of our case, there are also judicial ones which are even stronger and need to be considered. This is best done by dividing ship supplies into two basic categories:

1. Supply of victuals and "necessaries" in support of the crew.

2. Supply of stores, spare parts, etc, required for the building, repair and, more particularly, the upkeep of the ship.

70. So far as victualling is concerned, there can be no doubt that it is essential to the survival of the crew and that it is made in fulfilment of a specific obligation of the shipowner to the crew embarked, based on legal and contractual requirements.

71. It is a classical example of the case of an obligation fulfilled by a third party on behalf of a debtor and merits the same treatment as that given to the crew's social security payments.

72. This similarity is even more apparent where the shipowner contracts, on a daily rate basis, a supplier (who becomes the caterer) to provide the services to cook and serve meals, thereby replacing the owner in his obligation to feed the crew, a requirement that is often established in many countries by law in detailed schedules.

73. As further proof that it is an owner's obligation, made by a third party, the supplier, towards the crew, is the fact that in many ships the shipowner allocates to the Master, or other nominated officer, a fixed daily rate for the purchase of victuals to feed the crew. This obligation exists not only as a general requirement but also as a specific one and this is proved by the fact that legislation on the form of contracts gives priority to such matters even over wages.

74. Finally, the International Labour Organisation in Article 8 of its Convention 109 (revised 1958) states clearly that "feeding, or sums needed for it, are to be considered as part of the wages of seamen". This clearly establishes, on an international basis, that the obligation to feed crews is related to wages and establishes the principle that food and other needs in the life of a seaman are more important than their wages and must be granted to them as a right.

75. If, as we argue, the food supplied to crew members forms an integral part of their wages, the nature of the relationship between the shipowner and the supplier (or caterer) is the same as that of the provider of social insurance. It is the fulfilment, by a third party, of a shipowner's specific obligation to supply to his crew the wages due to them, directly or indirectly.

76. It appeared, however, that in their deliberations the Committee of Experts sought to ensure that protection was only given to the social welfare of the seamen and not to protect the interests of the ship supplier. The answer to this differentiation between the activity of the insurance company and the ship supplier is that it is unfair, since both give a service. The ship supplier covers the daily feeding arrangements of the crew, a service normally paid for after its supply, whereas conversely the social security payments cover a long-term future commitment, paid for in advance.

77. In the event of non-payment the insurance company obtains redress through a withdrawal of its services, whereas the ship supplier can obtain no such redress, other than to refuse to supply the ship. In this eventuality, the welfare of the crew will be put in jeopardy for the sole reason that the ship supplier lacks any protection for the credit he is required to give. It is against this eventuality that maritime lien has always surely been granted.

78. The right of lien on the ship is granted to protect these essential services because of the importance of protecting the welfare of the crew and should also include, as well as the wages and social security payments currently included in the new draft proposals, the cost of feeding.

79. We therefore believe that we are justified in recommending to distinguished delegates in the strongest possible manner that article 4 should be amended to include at the end of the article the words "and any sums due for their feeding and life on board".

80. In relation to supplies for the upkeep of the ship, we would draw attention to the right of retention, granted in article 6 (bis) to the shipbuilder and ship repairer. The "ratio legis" accepted by all members of the Joint Committee of Experts has been that the work of the shipbuilder and ship repairer maintains the value of the ship and therefore it is in the interests of other creditors to grant this protection. In equity, this same argument must also apply to ship stores and spare parts supplied for the maintenance and repair of the ship which should logically enjoy the same right of protection.

81. The need for this protection is well demonstrated where supplies are ordered by shipowners, or their agents, for the use of the shipyard but delivered directly to the vessel and not to the shipyard where the vessel is building or undergoing repairs, a practice that is current and used to save the shipowner shipyard handling charges.

82. The drawing of a distinction, however, between the shipyard and the supplier activity is both anomalous, and unfair, and not soundly based in law. We believe that parity should be established between the shipyard/ship repairer and the supplier of goods in support of their activity through the introduction of an additional phrase to paragraph 3 of article 11, as suggested by the chairman of the committee, where it is stated that "The shipbuilder and ship repairer is entitled to obtain satisfaction of his claim out of the proceeds of sale, after the satisfaction of the claim of the holder of maritime liens mentioned in article 4", by the addition of the words "the same right is granted to the suppliers of materials supplied for the building, repair and maintenance of the ship".

83. In the light of the above arguments, we are confident that the Diplomatic Conference will reconsider the position of the ship supplier, who is responsible for providing on a daily basis, 364 days per year, the provisions and stores needed to maintain the ship in an operational state, a service that is vital to the maintenance of the programmes of the many thousands of ships that enter and leave harbour daily.